

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1657

Cir. Ct. No. 2012FO973

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF WALWORTH,

PLAINTIFF-RESPONDENT,

V.

WEST ROD COTTAGE INDUSTRIES, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

¶1 REILLY, J.¹ West Rod Cottage Industries, LLC, appeals from a judgment finding it violated Walworth County's shoreland zoning ordinance by

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

operating a marina at its lakeside tavern. West Rod argues that as the tavern has rented boats and slips since prior to the adoption of the ordinance, its rental of boat slips was a legal nonconforming use. We affirm; West Rod's evidence established at best only a sporadic rental of boat slips during the relevant time period and, thus, failed to meet its burden of proof to establish that its marina operation was a legal nonconforming use.

BACKGROUND

¶2 Fred's Tap is a tavern located along the shore of Lake Beulah in Walworth County. Fred's Tap has been continuously operating since at least 1961 when Fred Meyer bought it and consists of two parcels divided by Stringers Bridge Road. The "tavern" parcel is adjacent to a channel leading into Lake Beulah via a culvert that goes under the road, and the "lake" parcel consists of a cottage, garage, and parking area along the main body of Lake Beulah. Both parcels have areas to moor boats.

¶3 Walworth County enacted its shoreland zoning ordinance in 1971. The County zoned the "tavern" parcel as B-3, "Waterfront business district," which permits boat rentals and "boat liveries" of ten or fewer boats. WALWORTH COUNTY, WIS., CODE OF ORDINANCES § 74-182 (2014). Conditional uses in the B-3 waterfront business district include "[t]averns and bars," "[y]achting clubs and marinas," and "[b]oat liveries" (which we assume to be liveries operating with more than ten boats). *Id.* The County zoned the "lake" parcel as C-4, "Lowland resource conservation district," which permits "boating" and the construction and

maintenance of piers, docks, and walkways.² CODE § 74-179. Marinas and boat liveries are prohibited in a C-4 district as they are not listed as a permitted use. *Id.*

¶4 In 2012, the County issued a citation to West Rod, the owner of Fred's Tap, for "[o]perating a boat marina/access site in the C-4 zone district" in violation of § 74-179 of the Walworth County shoreland zoning ordinance. Following a three-day trial, the circuit court concluded that West Rod failed to show by a preponderance of the evidence that its marina operation was a legal nonconforming use and imposed a \$663 forfeiture. West Rod appeals.

DISCUSSION

¶5 We begin with two observations. The first is that West Rod appeared pro se at the trial. West Rod's owners purchased Fred's Tap from Meyer's family sometime in the early 2000s. West Rod is owned by John Stoss and Carla Giorgi. Stoss is not an attorney but was allowed to represent West Rod. Stoss did not testify but offered his theories and unproven facts to the court. Giorgi testified and therefore we accept her sworn testimony as the owner's evidence of the facts surrounding the purchase and operation of Fred's Tap.

¶6 Our second observation is that both the County and West Rod have fundamental deficits in their arguments. West Rod appears to have the false belief that if it proved a continuous rental activity involving the piers at Fred's Tap (regardless of whether this use was as a boat livery or as a marina), the County has no zoning authority over the use of those piers. The County has the false belief that a distinction exists for purposes of our review that the "lake" parcel has C-4

² Initially the property was zoned C-1. The distinction is not meaningful for this appeal.

zoning and the “tavern” parcel has B-3 zoning. The particular zoning on each parcel is irrelevant when addressing the question presented: whether the “use” the County is trying to prevent was a use that existed when the zoning at issue was first imposed upon the property and, if so, whether that use continued thereafter such that its nonconforming use status was not lost.

Nonconforming Use

¶7 “A nonconforming use is a use of land for a purpose not permitted in the [zoning] district in which the land is situated.” See *Waukesha Cnty. v. Seitz*, 140 Wis. 2d 111, 114-15, 409 N.W.2d 403 (Ct. App. 1987). Land use is “nonconforming” if there is (1) an active and actual use of the land and buildings that existed prior to the commencement of the zoning ordinance and (2) the use has continued in the same or a related way until the present. *Id.* at 115. The burden is on the property owner to prove by a preponderance of evidence that the nonconforming use existed at the time of the adoption of the ordinance and has continued since. *Walworth Cnty. v. Hartwell*, 62 Wis. 2d 57, 61, 214 N.W.2d 288 (1974). This burden includes the requirement that the property owner show that the use was “so active and actual that it can be said he [or she] has acquired a ‘vested interest’ in its continuance.” *Id.*

¶8 The nonconforming use concept does not cover any activity simply because it takes place on the premises. See, e.g., *Sohns v. Jensen*, 11 Wis. 2d 449, 457-58, 105 N.W.2d 818 (1960). “If the specific use ... was but casual and occasional, or if such use was merely accessory or incidental to the principal use, then it cannot be said that the property owner had acquired a ‘vested interest’ in the continuance of such a use.” *Hartwell*, 62 Wis. 2d at 61.

¶9 From this black letter law we make the following observations in this case:

- (1) The leasing of boat slips is the “use” at issue;
- (2) The County has the burden to prove that Fred’s Tap was leasing boat slips and that such activity was not allowed without a conditional use permit as to the “tavern” parcel and not at all on the “lake” parcel; and
- (3) West Rod bears the burden to prove by a preponderance of the evidence that its leasing of boat slips was an active and actual use that existed prior to 1971 and has continued as the same or a related use until the present such that it is a valid nonconforming use.

¶10 The circuit court found that West Rod rented at least nine boat slips in 2011 and that it did not have a conditional use permit allowing it to operate a marina. The court failed to make any other necessary findings of fact. We assume that the court found that West Rod had not established that Fred’s Tap had an active and actual boat slip/marina operation prior to the adoption of the shoreland zoning ordinance in 1971 and/or that it had not established the marina’s continued use, or something related to that use, in the forty years since the ordinance went into effect. *See Sohns*, 11 Wis. 2d at 453 (we assume when a finding is not made that it was determined in support of the judgment).

¶11 We review findings of fact for clear error. *Seitz*, 140 Wis. 2d at 115-16. As such, we must examine the evidence presented at trial to determine whether the findings that West Rod operated a marina at Fred’s Tap in 2011 that was not in operation prior to 1971 or continuously in the years since is against the great weight or clear preponderance of the evidence presented at trial, accepting all reasonable inferences and weighing any contrary evidence in favor of the court’s findings. *See Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983). We independently apply these facts to the legal question of whether the historical land use qualifies as a valid nonconforming use. *Seitz*, 140 Wis. 2d at 116.

Facts

¶12 The County’s case consisted of the testimony of Darrin Schwanke, the County’s code enforcement officer. Through Schwanke, a craigslist ad offering the rental of boat slips for the 2011 boating season at Fred’s Tap was received into evidence. Nine separate “slip leases” were also received into evidence reflecting that Fred’s Tap had leased out nine slips for the season at a rate of \$1600 per slip. Schwanke testified that he observed six pontoon boats moored at the piers on June 21, 2012. Schwanke testified that he had no personal knowledge of Fred’s Tap prior to 2004. The County rested after Schwanke’s testimony.

¶13 West Rod called a number of witnesses who offered testimony relevant to the issue of the activities occurring at Fred’s Tap over the years. That testimony can be distilled as follows: (1) Fred’s Tap rented out boats to customers since at least 1963; (2) Fred’s Tap accepted cash to moor individual boats sometime in the 1990s; (3) customers of Fred’s Tap could park their boats at the

pier on the “lake” parcel while visiting the tavern; (4) since 1981, boats have been moored at Fred’s Tap, including some with rental agreements; (5) when West Rod purchased Fred’s Tap, two individuals appeared to be paying rent to moor their boats there; and (6) Fred’s widow consistently maintained a boat livery at the property, even when tavern hours were inconsistent.

Analysis

¶14 In light of the above facts, we affirm the court’s conclusion. The County met its burden to show that Fred’s Tap was using its property in 2011 to rent boat slips, i.e. operating a marina, in violation of the Walworth County Code. It was West Rod’s burden to prove by a preponderance of the evidence that a valid nonconforming use as to the rental of boat slips existed. West Rod did not meet this burden. The evidence at best showed a limited and occasional rental of boat slips as of 1971 and thereafter until 2010 when West Rod began large-scale boat slip rentals. West Rod did not acquire a vested interest in the rental of boat slips when it purchased Fred’s Tap based upon the evidence presented to the court.

¶15 West Rod’s evidence may have been sufficient had the use at issue been the rental of boats, i.e., a boat livery business. As of 1971 and up to the time West Rod purchased Fred’s, the evidence clearly reflected a boat livery operation at Fred’s. Fred’s Tap (both parcels) was shown to be a place (in 1971) where boats could be rented and where boats could moor on either parcel so as to enjoy food and beverage at Fred’s. Fred’s clearly operated a boat livery business in 1971. The evidence does not show, however, that Fred’s actively and actually operated a marina either prior to 1971 or in subsequent years up to 2010. The pre-ordinance use of the property as it relates to marina-type activities was established

at trial as limited, occasional, and sporadic. This is insufficient to qualify as a legal nonconforming use. *Hartwell*, 62 Wis. 2d at 61.

CONCLUSION

¶16 As West Rod did not meet its burden to show that Fred's Tap had an active and actual boat slip rental/marina operation prior to the adoption of the County's shoreland zoning ordinance in 1971 or that it actively continued such an operation as more than an occasional and incidental use at the property, we affirm the circuit court's imposition of the forfeiture for West Rod's violation of § 74-179 of the Walworth County Code.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

